



**TO: Members of the Senate Committee on Judiciary**  
**FROM: Jay Diaz, Staff Attorney / Public Advocate, ACLU of VT**  
**DATE: February 5, 2016**  
**SUBJECT: S. 154 (2016) – Assault on Public Employee Enhancements and Criminal Threatening**

On behalf of the ACLU of Vermont, I submit my written testimony in opposition to S. 154. S. 154's amendments to section 1028 and the new crime of Criminal Threatening are unnecessary, duplicative, potentially unconstitutional, likely to disproportionately impact marginalized populations, and antithetical to Vermont's stated policy goals.

### Section 1028 Amendments

Regarding amendments to section 1028, the statute generally is duplicative of other statutes on assault.<sup>1</sup> The additional enhancement is unlikely to deter people who wish to commit assault in on state employees or members of the public. The original statute's intent was to protect emergency workers trying to save lives in emergency situations. In that sense, the bill was to protect the general public as much as the police, firefighters, and emergency medical technicians.

Of course, social workers and family services employees deserve to be protected from assault as much as any other Vermonter. But, FSD employees are not typically present in emergency situations when discharging their duties, and thus are inappropriate for inclusion in this section. In addition, the ACLU of Vermont opposes any mandatory minimums as antithetical to Vermont's stated goal of reducing the prison population. Finally, if the bill must go forward, the penalty structure should be adjusted to apply lesser penalties for simple assaults as done in similar federal statutes.<sup>2</sup>

### New Criminal Threats Statute

#### A. Duplicative, Unnecessary, and Expensive

Regarding the new Criminal Threats statute that S. 154 would create, the ACLU of Vermont believes the language is unnecessary and duplicative because it is already illegal to threaten another person under Vermont's disorderly conduct, aggravated disorderly conduct, and simple assault statutes. 13 V.S.A. §§ 1023, 1026, 1026a. Moreover, the current statutes are already thoroughly enforced. Public Order cases, of which threatening disorderly conduct is included, make up the largest category of filing in Vermont's criminal courts.<sup>3</sup>

#### B. Constitutional Challenges Should Be Expected

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<sup>1</sup> See 13 V.S.A. §§ 1023, 1024

<sup>2</sup> See 18 U.S.C. § 115(b)(1)

<sup>3</sup> See Criminal Division Statistics, attached to testimony (Page 10, DC – Chart 1)

Second, S. 154 is likely to be challenged as unconstitutional under the First Amendment because it is overly broad and vague. Statutes criminalizing threats have long raised free speech concerns, and therefore are heavily scrutinized by courts. While threats against specific individuals are not protected speech under the First Amendment, courts have regularly found that the speech or conduct must directly threaten another person with imminent physical violence. In addition, courts use an objective standard (reasonable person in similar circumstances as the “threatened” party) when examining whether speech or conduct constitutes a criminal threat. Nevertheless, Vermont and federal courts have clearly stated that hyperbolic statements, expressions of frustration, and words or actions that a reasonable person could not believe possible to accomplish are protected utterances. The criminalization of threatening speech, without additional clarification in the legislation, will likely criminalize and chill such speech protected by the First Amendment. If it must pass, the bill’s language should be amended to meet the standards used by the Vermont and U.S. Supreme Court to describe true threats.<sup>4</sup>

### C. Likely Disproportionate Impact on People of Color

Third, the legislation is likely to be particularly harmful to marginalized groups who are already disproportionately arrested and imprisoned in Vermont. Substantial research has conclusively demonstrated that although a white and person of color may have the same conduct, the person of color is more likely to appear threatening.<sup>5</sup> In particular, research suggests that young African-American men are both implicitly and explicitly associated with threat in the minds of the general public, and are often misperceived, suspected, automatically evaluated, and misremembered as aggressors.<sup>6</sup> Because persons of color are generally misperceived as more threatening, they will be unfairly and disproportionately charged under a law that further criminalizes threats. Vermont should not propose a criminal statute that will have such an obviously discriminatory impact.

### D. Will Increase the Prison and Juvenile Delinquent Populations

Finally, a new criminal statute will not further Vermont’s goal to reduce the prison and juvenile detention populations. The bill is particularly likely to be used against children, who often push boundaries with their use of language and idle threats, particularly against adults. As is well known, criminalizing childhood behavior leads children down the path to prison and poverty. We should avoid increasing the chances for such possibilities and not create this new crime.

In conclusion, the courts have made it clear that Free Speech means that people have the right zealously, hyperbolically, and even aggressively advocate their positions on any topic. Any statute that potentially criminalizes speech and expressive conduct should be narrowly tailored to ensure that it does not criminalize or chill protected speech. The bill’s current language is far too broad and likely to inspire unjust prosecutions. The bill should be opposed or significantly narrowed.

Thank you for the opportunity to testify and provide written comment on this legislation.

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<sup>4</sup> See *State v. Albarelli*, 189 Vt. 293 (2011); *U.S. v. Turner*, 720 F.3d 311 (2<sup>nd</sup> Cir. 2013).

<sup>5</sup> Shapiro, et. al., Following in the Wake of Anger: When Not Discriminating is Discriminating, *Pers. Social Psychology Bull*, Vol. 35 No. 10, 1356-1367 (2009)(<http://psp.sagepub.com/content/35/10/1356>); See also, <http://www.psmag.com/business-economics/black-male-faces-3571>

<sup>6</sup> Trawalter, et. al., *Attending to Threat: Race-based Patterns of Selective Attention*, *Journal of Exp. Social Psychology*, Volume 44(5), 1322-1327 (2008)(<http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2633407/>)